

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C.)	
Complainant)	
)	
v.)	D.T.E. 01-70
)	
SHREWSBURY’S ELECTRIC LIGHT PLANT)	
Respondent)	
)	

COMMENTS OF SHREWSBURY’S ELECTRIC LIGHT PLANT

Through a December 15, 2003 Procedural Memorandum, the Department of Telecommunications and Energy (“Department” or “DTE”) directed the parties to the above-captioned matter “to file comments on the effect of Fibertech’s M.D.T.E. 3 on this proceeding....” The Department also stated that “[T]he new wholesale tariff may affect questions on law or fact material to the Department’s review of Fibertech’s motion for reconsideration and clarification of the Department’s interlocutory order....”

On January 6, 2004, Fiber Technologies Networks, L.L.C. (“Fibertech”) filed its comments and stated:

This tariff filing (M.D.T.E. 3) does not alter fundamental issues presented by Fibertech’s long-pending complaint and motion for reconsideration.

Fibertech’s Comments, p. 1. Shrewsbury’s Electric Light Plant (“SELP”) agrees that the filing by Fibertech of its wholesale tariff, M.D.T.E. 3, does not alter or impact the issues of law and fact raised by Fibertech’s motion for reconsideration and clarification, or, for that matter, it’s initial complaint, as set forth below.

SELP, however, must register its protest at Fibertech's attempt to use the Department's request for comments as an excuse to supplement or reargue its earlier filings seeking reconsideration of the Department's Interlocutory Order in Fiber Technologies Networks, L.L.C., D.T.E. 01-70 (December 24, 2002) (hereinafter, "*Interlocutory Order*"). "Section I" of Fibertech's "Argument"¹ in its January 6, 2004 comments should be retitled "Response to the Opposition of SELP to Fibertech's Motion for Reconsideration," because the entire four pages of "Argument" has absolutely no bearing on and includes no mention of M.D.T.E. 3 or the Department's August 12, 2003 memorandum entitled "Clarification of Wholesale Tariffing Requirements" (hereinafter "*Wholesale Tariff Clarification Memorandum*"). Accordingly, SELP requests that the Department strike or refuse to consider those portions of Fibertech's Comments that supplement or reargue points already made in its previous reconsideration filings that relate in no way whatsoever to M.D.T.E. 3, such as those pertaining to grants of location,² unlit versus lit fiber, and SELP's alleged "motives" for denying Fibertech's request. For the convenience of the Department, SELP has enclosed a copy of Fibertech's Comments indicating

¹ We note that the Department requested comments, not "briefs," since these filings are not actually "pleadings" under the Department's Procedural Rules. Fibertech's use of the term "Argument" clearly shows that it is attempting to use the comments as an excuse to file yet another pleading in its interlocutory appeal fiasco.

² Fibertech's attempt to supplement its prior Motion for Reconsideration in the filing of these comments results in further misrepresentations of SELP's prior arguments. For example, Fibertech asserts on page 6 of its "Comments" that SELP has conceded no grant of location is actually necessary for Fibertech. As SELP set forth in its Opposition to Fibertech's Motion for Reconsideration, and as plainly stated in G.L. c. 166, § 22, grants of location are not simply to be had for poles; they are also required for the construction of lines over the public way. SELP's Opposition, p. 12. The Department agreed in its Interlocutory Order dated December 24, 2002 at pages 18 through 19.. Because SELP will not petition for an increase in the number of wires on its poles because Section 22 does not apply to it in the first place, Fibertech will not have to seek a grant of location for the wires on its own through the Selectmen two separate times. Fibertech would need only one grant of location it seeks from the Selectmen in Shrewsbury for the route of the wires. It would not need another once the license was finalized. That is the only point SELP was trying to make but apparently it was lost upon Fibertech. In any event, it does not belong in response to the Department's request for comments in this matter because it relates in no way whatsoever to M.D.T.E.3 or the *Wholesale Tariff Clarification Memorandum*.

those portions of the text SELP contends are completely outside the scope of the Department's request for comments.³ (The marked-up Comments are attached as Exhibit 1.)

BACKGROUND

On August 12, 2003, the DTE's Telecommunications Division issued on its *Wholesale Tariff Clarification Memorandum*. According to the *Wholesale Tariff Clarification Memorandum*, the "directives and policies" contained therein:

...are intended to clarify that the tariff filing obligation for wholesale services depends upon the individual carrier's business plans to offer services indiscriminately....

Wholesale Tariff Clarification Memorandum, at 9. In its Comments, Fibertech first translates this *Memorandum* into an "*Order*" as if it were issued by the full Commission, and then further translates the DTE's approval of M.D.T.E. 3 into specific "*Findings*" that definitively resolve the issue of whether Fibertech is a company incorporated for the transmission of intelligence, mainly because now Fibertech is a "common carrier." As set forth below, this *Memorandum* is not an Order and does not contain findings, and Fibertech's "common carrier" status or lack thereof is just as irrelevant to the issue of whether Fibertech can qualify as a "licensee" as it was over a year ago. See G.L. c. 25, § 5; 220 C.M.R. 1.07, 1.11

Nothing has changed from a factual perspective since Fibertech filed its Statement of Business Operations ("SBO") in August of 2001. Rather than simply answer discovery that the Department ruled in its *Interlocutory Order*⁴ was relevant to the resolution of Fibertech's

³ We note that while Fibertech has complained bitterly about the delay in final adjudication of its Complaint, it is Fibertech, and no one else, that has cause delay after delay in this matter through its filings and refusal to answer discovery.

⁴ On December 24, 2002, the Department issued an Interlocutory Order on Fibertech's appeals from Hearing Officer's rulings on discovery and Fibertech's Motion for Summary Judgment (hereinafter, "*Interlocutory Order*"). Pursuant to the *Interlocutory Order*, Fibertech was given fourteen (14) days to produce certain documents requested during discovery by SELP. Fibertech has never produced the documents, and instead, sought reconsideration of the *Interlocutory Order* on January 13, 2003, despite the fact that reconsideration is unequivocally unavailable for a

complaint—even in heavily redacted form-- Fibertech has fought tooth and nail against providing any information to the Department or SELP that would tend to show it is a company engaged in the transmission of intelligence under G.L. c. 166, § 21. Indeed, nothing has occurred since the issuance of the *Interlocutory Order* that would impact the findings in that Order.

Two events not material to the outcome of Fibertech’s pending Motion for Reconsideration have occurred since January of 2003: first, the Department issued its *Wholesale Tariff Clarification Memorandum* on August 12, 2003; and second, in response to that Memorandum, on the ninetieth day following that Memorandum, Fibertech filed its wholesale tariff, M.D.T.E. 3, ostensibly in order to comply with the Department’s *Memorandum*. As set forth below, M.D.T.E. 3 in fact does not comply with the *Wholesale Tariff Clarification Memorandum*. (However, even if it did, it would not alter the Department’s ruling on Fibertech’s Motion for Reconsideration, which SELP maintains should be a denial for the reasons set forth in its Opposition.) It is upon these two events that the Department has requested the parties to these proceedings comment, as they relate to Fibertech’s Motion for Reconsideration on the issues of (1) Fibertech’s status as a “licensee” and (2) whether Fibertech is a company incorporated for the transmission of intelligence. In its December 15, 2003 request, the Department did not reopen this matter for reargument or for supplemental pleadings on the Reconsideration in general.

non-final Order of the Department. 220 C.M.R. 1.11(10). For example, while SELP disagrees with the portion of the *Interlocutory Order* that deems dark fiber to be an “attachment” under G.L. c. 166, § 25A. *Interlocutory Order*, at 28. However, while SELP may appeal the dark fiber issue in a final order, there is no basis to request reconsideration of that issue at this time. Similarly, there is no basis for Fibertech’s Reconsideration. Apparently having recognized that fatal flaw in its pleading, Fibertech has on a retroactive basis attempted to re-tool that pleading’s focus into one of “clarification,” as if there is something terribly confusing about a document compelling the production of documents. Fibertech’s steadfast refusal to produce any documents that the Department has ordered Fibertech to produce leads to the conclusion that Fibertech must not be engaged in the transmission of intelligence.

COMMENTS

I. The Filing of M.D.T.E. 3 by Fibertech Does not Demonstrate that it is a Company Incorporated for the Transmission of Intelligence

Fibertech completely misinterprets the Department's *Wholesale Tariff Clarification Memorandum*, as well as the November 10, 2003 tariff filed by Fibertech in purported compliance with the *Wholesale Tariff Clarification Memorandum*. In establishing new requirements for the filing of wholesale tariffs in that *Memorandum*, the Department did nothing to undercut or modify the conclusions set out in its *Interlocutory Order* regarding the significance of tariff filings and tariff approvals—or lack thereof.

In the *Interlocutory Order*, the Department reviewed the regulatory history leading up to the current practice of requiring common carriers to file a Statement of Business Operations (“SBO”) and a tariff, and reached the following conclusions:

In the registration process, the Department reviews whether the filed tariffs are just and reasonable. Registration does not involve a finding that the company is engaged currently in the transmission of intelligence, nor does the Department have a requirement that a company be engaged currently in the transmission of intelligence in order for it to maintain its registration. The only determination made is that the applicant is authorized, by virtue of having an approved tariff, to provide the tariffed services. We note that many companies register in advance of doing business in Massachusetts, and some never do become operational.

The effective tariff is prima facie evidence only that the rates are lawful, until changed or modified by the Department. G.L. c. 159, § 17. However, the lawfulness of approved tariffs “shall not give to such rates any greater weight as evidence of the reasonableness of other rates than they would otherwise have.” Id. A company's registration, viz., the company's approved tariffs, is not evidence that the Department has granted any authority beyond the authority to offer the tariffed services. Registration itself does not show that the Department has authorized a company to construct lines across public ways or show that the company is in the business of transmission of intelligence. Therefore, Fibertech's registration as a common carrier does not establish that the Department has authorized Fibertech, pursuant to G.L. c. 159, § 12, to construct lines across the

public ways. Similarly, Fibertech's registration as a common carrier does not itself establish that it actually is in the business of transmission of intelligence; in permitting registration, the Department has made no such affirmative finding.

Interlocutory Order at 18-19 (footnote omitted).

In issuing new requirements for the filing of wholesale tariffs in its *Wholesale Tariff Clarification Memorandum*, the Department has done nothing to alter the basic tenet of its *Interlocutory Order*, i.e., that the filing of an SBO and a rate tariff, followed by approval of that tariff, is not tantamount to a finding that a company is actually in the business of transmitting intelligence as required by G.L. c. 164, § 21. The filing of a tariff – and approval of that tariff – is simply not the same as demonstrating that an entity is in the business of transmitting intelligence. This is the case whether the tariff is for wholesale service or retail service. And, it remains the case whether the Department requires a tariff to include five elements or 500 elements.

Indeed, the Department's *Wholesale Tariff Clarification Memorandum* imposes certain new requirements for the filing of wholesale tariffs. As part of the process for filing intrastate wholesale tariffs for telecommunications services, companies are required to indicate whether the service offered is "either currently available, available within a specified time frame, or available subject to specific regulatory approvals." Moreover, "[C]arriers must indicate their plans for offering such service in their transmittal letters and initial statements of business operations ("SOBOs"), and in timely amendments to their SOBOs." Finally, the *Wholesale Tariff Clarification Memorandum* states that "[T]ariffs for such services will be rejected where no time frame or specific regulatory milestones for the offering of such services are indicated." *Wholesale Tariff Clarification Memorandum* at 9.

While the Department's new tariff filing requirements may well result in some reduction in the number of tariffs filed by companies that never enter the business of transmitting

intelligence, in the end the filing of a tariff - even a tariff which is accompanied by attestations of plans for providing actual service – is not the same as a demonstration that a company is actually in the business of transmitting intelligence. And, should the Department approve an intrastate wholesale tariff for telecommunications services, such an approval does not rise to the level of a finding that said company indeed is in the business of transmitting intelligence or soon will be in that business. Using the Department’s own words, a tariff approval in this instance means only “that the applicant is authorized, by virtue of having an approved tariff, to provide the tariffed services”. *Interlocutory Order* at 18. And, while an approved intrastate wholesale tariff for telecommunications service may now be accompanied by a statement that service is being provided or soon will be provided, any such statement is only that, a statement, and not evidence.

Remarkably, Fibertech takes the position that the *Wholesale Tariff Clarification Memorandum* “involves” a finding that the filing of a registration and pro forma wholesale tariff is tantamount to establishing that a company is “engaged currently in the transmission of intelligence.” Fibertech Comments at 8. Fibertech reaches this unsupported conclusion in a most circuitous manner. According to Fibertech, because (1) the Department now requires a wholesale tariff to be accompanied by a statement that a company’s service is either currently available or soon will be available, and (2) the Department will reject tariffs that do not include such statements, the Department’s approval of a wholesale tariff amounts to a “finding” that tariffed services are or will be available shortly.

Such a wishful position cannot even survive minimal scrutiny. First, as Fibertech is well aware, the Department makes no findings on this issue or any other issue in its *Wholesale Tariff Clarification Memorandum*. Fibertech’s failure to cite to a single such “finding” in its comments only underscores this point. Second, the Department’s *Wholesale Tariff Clarification*

Memorandum is a staff-generated document and not a Commission order. See 220 C.M.R. 1.07, 1.11. Divining a “finding” from an administrative document which was neither issued by the Commission nor issued in the context of an adjudicatory proceeding stretches the definition of a “finding” beyond any accepted use of that term under Administrative Law. See G.L. c. 25, § 5.

More remarkably, it appears that Fibertech is claiming that the Department ‘s approval of its intrastate wholesale tariff amounts to a finding that Fibertech is engaged in the business of transmitting intelligence *even though Fibertech has failed to comply with the requirements of the Wholesale Tariff Clarification Memorandum*. A review of Fibertech’s M.D.T.E. 3 tariff and the transmittal letter accompanying that tariff reveals no mention of whether Fibertech’s tariffed services are “either currently available, available within a specified time frame, or available subject to specific regulatory approvals.” Moreover, it does not appear that Fibertech has amended its SBO to include any such statement.⁵

SELP is hard-pressed to understand how Fibertech can argue that the issuance of the Department’s *Wholesale Tariff Clarification Memorandum* coupled with its filing (and the Department’s approval) of M.D.T.E. 3 amounts to a Department “finding” that Fibertech is engaged in the business of transmitting intelligence when Fibertech has not even bothered to comply with the Department’s requirements for intrastate wholesale tariffs. Fibertech appears to view the Department’s *filing requirements* in the *Wholesale Tariff Clarification Memorandum* as some sort of automatic “finding” that any company which files an intrastate wholesale tariff is engaged in the business of transmitting intelligence *regardless of whether that company actually complies with the Department’s tariff-filing requirements*. If Fibertech is arguing that the *Wholesale Tariff Clarification Memorandum* is so significant that its mere issuance results in

a finding that Fibertech is engaged in the business of transmitting intelligence, but, at the same time arguing that the *Wholesale Tariff Clarification Memorandum* is not important enough to warrant Fibertech's compliance, then it appears that Fibertech has stretched the scope and meaning of the *Wholesale Tariff Clarification Memorandum* well beyond anything the Department intended.

In fact, it appears that the *Wholesale Tariff Clarification Memorandum* requires the Department to reject M.D.T.E. 3. As discussed above, in its *Wholesale Tariff Clarification Memorandum* -- and, in particular, Directive 4 in that Memorandum -- the Department indicated that an intrastate wholesale tariff would be rejected if the company failed to indicate in its transmittal letter or in its SBO that the service being tariffed is "either currently available, available within a specified time frame, or available subject to specific regulatory approvals." Where Fibertech failed to comply with this requirement, its tariff should have been rejected -- a result which is far cry from the "free pass" it now claims should result from the Department's *Wholesale Tariff Clarification Memorandum*.

II. The Department's *Wholesale Tariff Clarification Memorandum* Leaves the Reasoning Behind the *Interlocutory Order* Intact on the Common Carrier Issue

As the Department stated in its *Interlocutory Order* -- which we note is still in full force and effect unless and until reversed by the Department -- "common carrier status does not itself establish that it is actually in the business of transmission of intelligence." *Interlocutory Order* at 19. Further, as the Department has found, "whether Fibertech may qualify as a licensee depends not on whether Fibertech is indeed a common carrier, but rather, on whether Fibertech is in the business of transmission of intelligence." *Id.* at 21. The issuance of the *Wholesale Tariff*

⁵ Department records indicate that Fibertech's most recent SBO was filed on August 9, 2001.

Clarification Memorandum sheds no light on the legal and factual issues pertaining to whether Fibertech is a company engaged in the transmission of intelligence as that term is used in G.L. c. 166, § 21.

A review of the *Wholesale Tariff Clarification Memorandum* indicates that the Department wished to clarify that providers of intrastate wholesale services to entities other than end users must now file tariffs pursuant to G.L. c. 159, §§ 12 and 19. Those statutes have not changed since the Department issued its *Interlocutory Order*. The only thing that has changed by virtue of the *Wholesale Tariff Clarification Memorandum* is **who** must keep tariffs on file with the Department: an entity that may provide intrastate wholesale services now must file tariffs with the Department.

Fibertech had a retail tariff on file with the Department that it claimed demonstrated it was a company engaged in the transmission of intelligence—an argument which was already considered and rejected by the Department in its *Interlocutory Order*. See *Interlocutory Order* at 18-19. The same ruling applies to Fibertech’s wholesale tariff. Contrary to Fibertech’s assertions in its Comments at page 8, there is nothing in the *Wholesale Tariff Clarification Memorandum* that could even be construed as a “finding” that the filing of a wholesale tariff (as opposed to a retail tariff), and its approval, leads automatically to a “finding” that a company is incorporated for the transmission of intelligence and engaged in interstate commerce. See G.L. c. 166, § 21. Understandably, Fibertech offers no cite to where in the *Memorandum* this “finding” occurs, since none exists.

Contrary to Fibertech’s position at the bottom of page 8 of its Comments, the fact that the *Wholesale Tariff Clarification Memorandum* cites to G.L. c. 159, § 12 and the Department’s general supervision over the “transmission of intelligence within the commonwealth” does not

mean that the *Memorandum* defines the services subject to tariff filing requirements *as* the transmission of intelligence. The *Wholesale Tariff Clarification Memorandum* merely describes the indicia of “common carrier” status. *Wholesale Tariff Clarification Memorandum* at 5-6. Authorization to provide tariffed services whether on a wholesale or retail basis does not equal proof of authority to construct lines over the public way. See *Interlocutory Order* at 18.

Fibertech’s attempt at script writing at page 10 of its Comments is amusing, but completely off-base. First, as stated, Fibertech’s SBO does not indicate when, if ever, it plans to offer its tariffed services. Second, while we agree Fibertech is probably building *something*, at the heart of this case lies the question of whether it will ever be providing any *services* that might justify a finding that it is truly a company incorporated for the transmission of intelligence under G.L. c. 166, § 21 and therefore even capable of being authorized to construct lines in the public way as specified in G.L. c. 166, §25A. Attempting to assume the mantle of a “new entrant” by calling itself that and by filing a tariff simply does not cut it. Further, if Fibertech’s fervent belief in the merits of claims it may assert under Section 253 of the Telecommunications Act begs the question of why it has yet to file such a claim, nearly a year after the Department’s *Interlocutory Order*, and over two years after filing its Complaint.

Finally, the Department’s *Wholesale Tariff Clarification Memorandum* does not impact the fact that as a matter of law, Fibertech must nonetheless be authorized to construct lines in the public way, and that authorization must come via G.L. c. 166, § 22. Fibertech’s supplemental argument for reconsideration in its Comments (and its actions in other communities) simply underscores the fact that Fibertech would prefer G.L. c. 166 to just go away. Yet the “authorization” and “grant of location” issues are not going to go away, unless the Legislature repeals all provisions of the General Laws that speak to the exertion of local control, and

authority over the management of public ways. Even if Fibertech could show that it is a company incorporated in this state for the transmission of intelligence, or a company incorporated under the laws of another state for the transmission of intelligence engaged in intrastate commerce in the commonwealth, it must still obtain a grant of location from the Board of Selectmen. As the Department stated in its *Interlocutory Order*, “even if Fibertech were to demonstrate that it is in fact in the business of transmission of intelligence, that would not end the inquiry. Section 21 places a limitation on a company’s authority to construct lines across the public ways.” *Interlocutory Order* at 21. Clearly, the Board of Selectmen in Shrewsbury have a role in the process as dictated by the Legislature, since the Board determines whether such lines—assuming their construction is authorized—will incommode the use of the public way. And, the Board of Selectmen may very well be waiting until the Department makes a finding on the issue of whether Fibertech is a company incorporated for the transmission of intelligence before proceeding on Fibertech’s petition under G.L. c. 166, § 22. In any event, the processes under G.L. c. 166 are not subject to being superceded by virtue of the Department’s actions in this matter.

Respectfully submitted,

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PLANT

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